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No. 83-1557

In The

Supreme Court of the United States

October Term, 1983

CATHY JEAN JOHNSON and THOMAS RAY BOATZ JOHNSON and REBECCA JOYCE JOHNSON, by their next friend, CATHY JEAN JOHNSON,

Respondents,

vs.

PACIFIC INTERMOUNTAIN EXPRESS COMPANY,

Petitioner.

On Writ Of Certiorari To The Supreme Court Of Missouri

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Petitioner Pacific Intermountain Express Company (hereinafter, P.I.E.) has inaccurately stated the question presented for review by this Court. According to Petitioner, the Supreme Court of Missouri held P.I.E. responsible for the negligent acts of the driver of the truck "after expiration of the lease" and solely because of the presence of petitioner's identifying placard on the truck. The Missouri Supreme Court's opinion clearly shows that it did *not* decide whether the I.C.C. lease to petitioner was still in force and effect at the time of the accident. The Court stated:

> "We conclude that P.I.E. may be held liable for the truck driver's negligence, *without regard to the continuing force of the lease*, if the jury finds: (1) that a sign . . . was furnished by the carrier; (2) that the sign was on the truck at the time of the accident; and (3) that the truck was hauling regulated freight. . . ." (662 S.W.2d at 245; P.I.E.'s Appendix A at A-15) (Emphasis Supplied)

The Court then held that respondents had offered sufficient evidence and properly instructed on each of these elements.

It is against this factual background that the following question should be reviewed: Does the Missouri Supreme Court's holding that P.I.E. is vicariously liable for the driver's negligence infringe upon or deny any right that is guaranteed to P.I.E. by federal law?

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B. Petitioner's Claimed Right "To Be Treated Like An Owner" Under The Provisions Of The Motor Carrier Act Was Never Mentioned In The Trial Court, Was Asserted In The Missouri Court Of Appeals Only In Petitioner's Reply Brief, And Was Not Considered As A Determinative Factor By The Missouri Court Of Appeals Or The Missouri Supreme Court. 12

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JURISDICTION

Petitioner claims that certiorari juridiction exjsts because of the Missouri Supreme Court's interpretation of Interstate Commerce Commission regulations governing the leasing of trucks. Petitioner argues that these I.C.C. regulations as interpreted by the Missouri Supreme Court (1) deny petitioner its "right to be treated as if it were an owner" of the leased truck within the meaning of the Motor Carrier Act, and (2) violate Article I, Section 1 of the United States Constitution by "contradicting" the language of the Motor Carrier Act on which the regulations are based.

Neither of petitioner's arguments states a valid jurisdictional base. The jurisdictional statute, 28 U.S.C. Section 1257(3), provides for jurisdiction to review the judgment of a state court when the constitutional validity of a federal statute or treaty has been drawn into question, or when a federally guaranteed right has been asserted or claimed. These "federal" questions serve as a basis for jurisdiction *only* if they have been fairly presented to and passed on by the state court. Where the federal question is not raised in the lower state courts, is not made an assignment of error in the state court of highest resort, and is not passed on by the state court of highest resort, then the United States Supreme Court is without jurisdiction to issue a writ of certiorari. *Ellis v. Dixon,* 349 U.S. 458 (1955) *Congress of Industrial Organizations v. McAdory,* 325 U.S. 472 (1945).

In this case, P.I.E. raised the constitutional issue for the first time in its Motion of Rehearing in the Missouri Supreme Court. Similarly, P.I.E.'s asserted "right" under the Motor Carrier Act was raised late in the appellate process. Neither of these federal questions was ruled by the Missouri Supreme Court.[1]

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[1] The facts surrounding the presentation and determination of these federal questions will be more fully developed in the Statement of the Case and in Point I of the Argument, infra.

Since no federal question was timely raised in the state courts, and since none was ruled by the Missouri Supreme Court, there is no jurisdictional basis for the issuance of a Writ of Certiorari.

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STATEMENT OF THE CASE

P.I.E's statement of the case is, for the most part, adequate to present an overall view of the facts. That statement is somewhat lacking in three respects. First, it is incomplete with respect to describing P.I.E.'s leasing business and the dealings between P.I.E. and truck drivers Brown and Singleton. Second, P.I.E.'s statement tends to emphasize evidence which was rejected by the jury in reaching its verdict and to misconstrue some statements in the opinions of the lower courts which have decided the case. Finally, petitioner's statement is misleading in the manner in which it describes the presentation and determination of the federal question. Accordingly, respondents offer the following limited Statement of the Case, which addresses these three subjects.

P.I.E.'s Business Activities and Its Dealings With Brown and Singleton

Pacific Intermountain Express Co. is an authorized Interstate Commerce Commission motor carrier. One of its operating divisions, All States Trucking, leases tractor-trailer trucks from owners and operators and supplies the I.C.C. authority for those operators to haul regulated freight in interstate commerce. Whenever P.I.E. leases a rig from an owner or operator, a written contract is completed by the P.I.E. field agent, and the field agent gives the operator a sign or placard to be displayed on the truck, identifying P.I.E. as the carrier. The operators are sup-

posed to return the placard after each trip is completed, and if they lease to P.I.E. again, they will be issued a new placard.

When each trip is completed, the P.I.E. field agent is required to collect and send the package of trip documents, including the returned placards, to P.I.E.'s home office. If these documents are not returned to the home office at the proper time, the field agent can be fined. There is, however, no known sanction to be imposed upon the lessor-driver if *he* fails to return the placard to the field agent. Lessor-drivers had, at least on some occasions before this accident, failed to return the placards and still obtained payment for the trip, without penalty or criticism. If, for any reason, the field agent fails to send in his package of documents, P.I.E.'s home office would have no record of a lease having ever been entered.

The identifying placard of a major carrier is very valuable to the independent trucker. It gives him the apparent authority to operate in interstate commerce, and it permits him to travel without inquiry by law enforcement officers. P.I.E.'s system of controls over its placards is intended to prevent any use of the placards without P.I.E.'s knowledge and consent. The only ways to obtain these placards were (1) through a valid lease to P.I.E. or (2) without P.I.E.'s permission and consent, by stealing the signs from other operators or trading for them on the so-called "black market."

In 1978, Roland Tabor, of St. Louis, Missouri was an independent owner-operator of trucks. He leased the 1978 Kenworth truck involved here for a period of five years and began using it in a cross-country operation. He hired Lee Brown, Jr. and Bill Singleton to help drive this truck.

Tabor and the other drivers of his trucks often dealt with Pacific Intermountain Express Co. Tabor's contact

was primarily through a field agent named Kelly located in East St. Louis, Illinois. Tabor had been to Kelly's office, which was identified with a P.I.E. sign. He had been paid by Kelly with P.I.E. checks. Tabor also knew that the other drivers of his trucks dealt with P.I.E. in other areas of the country. He knew that Brown and Singleton had, on more than one occasion, dealt with a P.I.E. agent somewhere in New Jersey or New York. In fact, he had received checks for their work from a P.I.E. representative in New Jersey. Tabor also saw P.I.E.'s signs or placards upon the truck that Brown and Singleton were driving on several occasions when they would come through St. Louis during a cross-country trip.

Bill Singleton identified the P.I.E. representative with whom he and Brown dealt in New Jersey as Ray Dean. Dean had introduced himself as a P.I.E. agent the first time Singleton talked to him by telephone. Singleton described Dean's appearance and testified that they visited Ray Dean at an office marked with P.I.E. signs. He was the only P.I.E. representative with whom Brown and Singleton dealt on the east coast.

While Brown and Singleton were at the P.I.E. office, Dean "cut a lease" and gave a copy of the drivers. He also gave the drivers an advance for their expenses and a sign identifying P.I.E. that was to be placed upon the truck. During the first meeting, Dean told Singleton that, after the load was delivered on the west coast, he could get the remainder of his payment by mailing the sign and trip documents in to P.I.E.'s home office, or by keeping that material until he got back to the east coast and delivering it back to Dean.

That first trip for P.I.E. went off without incident. Singleton elected to personally return the P.I.E. trip docu-

ments and sign to Dean at the conclusion of the round trip. Singleton could not recall whether he removed the P.I.E. sign as soon as they delivered the P.I.E. freight on the west coast, or whether it remained on his truck until he arrived back in New Jersey. In any event, he was not criticized in any way when he returned the sign and the trip documents to P.I.E.'s New Jersey office and obtained his final payment.

The second time that Brown and Singleton hauled a load for P.I.E., they followed the same procedure. They dealt with Ray Dean at the P.I.E. office; they obtained a trip lease, P.I.E. sign, and advance money. Again, Singleton intended to return the trip documents, including the sign, when he was next on the east coast, but this time Singleton was sure that he did *not* remove the sign before the return (eastbound) trip. In fact, he ***never did*** remove that P.I.E. sign from the truck. He personally returned the trip documents to Ray Dean when he was next in New Jersey, but Dean did *not* ask for the sign back, and Singleton did not give it back. He obtained final payment for that second P.I.E. trip, even though he did not return the P.I.E. placard.

After that second load, Brown and Singleton hauled for P.I.E. on at least one or two more occasions before the November collision. Each time they visited the P.I.E. office, they dealt with Ray Dean. On each occasion, Singleton said, they may have been given a new placard, but they never used it because they were still operating with the P.I.E. sign affixed to their truck from their second P.I.E. trip. They developed a friendly working relationship with Dean, and Dean seemed to have confidence in Singleton's operation. Clearly, Singleton believed the series of transactions with P.I.E. would continue.

During these latter P.I.E. trips, Brown and Singleton were never criticized for failing to remove their P.I.E. sign and were never told that they had to take the sign off their truck after each trip. P.I.E. continued to do business on these terms without any criticism of the way Brown and Singleton used the placard. The last of their P.I.E. trips was only 10 to 12 days before the accident. The sign that was affixed to their truck on the second trip remained on the truck until the time of this collision. Singleton identified that sign as the one shown in Plaintiffs' Exhibit 8, the photograph taken after the accident.

Jury Determination and Lower Court Decisions

P.I.E. tried this case on the theory that it had *never* leased this truck from Brown or Singleton and that it could not be responsible merely because its sign somehow found its way onto the side of their truck. P.I.E. introduced the testimony of their employee, Jeff Sills, who described P.I.E.'s record keeping system in detail and testified that he had exhaustively searched those records. His conclusion was that P.I.E. had never leased the 1978 Kenworth driven by Brown at the time of this accident. From that conclusion, P.I.E.'s counsel argued to the jury that the sign which was on the truck at the time of the accident must have been stolen by Brown or Singleton or otherwise obtained through "black market" connections.

These factual issues were submitted to the jury by Instruction No. 7. In order to find in favor of plaintiffs, the jury was required to believe:

> Second, Pacific Intermountain Express Company leased the truck driven by Lee Brown, Jr. and provided a sign to be displayed on the truck identifying Pacific Intermountain Express Company as the carrier, and

> Third, Pacific Intermountain Express Company failed to remove the sign from the truck before the collision of November 19, 1978, . . .

The verdict in favor of plaintiffs-respondents clearly shows that the jury rejected P.I.E.'s trial theory. The jury *did* believe that P.I.E. leased this truck from Brown and Singleton and provided the sign to be displayed on it. The jury *did* believe P.I.E. failed to remove its sign before the collision occurred. The trial court overruled P.I.E.'s post-trial motions and entered judgment in accordance with the jury's verdict.

In the Missouri Court of Appeals, Southern District, P.I.E.'s argument centered around the fact that jury instruction no. 7 did not require a finding that Brown and Singleton were using the truck within the scope and course of their employment for P.I.E. at the time of the collision. This argument was based almost exclusively on the Missouri decision of *Brannaker v. Transamerican Freight Lines, Inc.*, 428 S.W.2d 524 (Mo. 1968). P.I.E. argued that *Brannaker* had previously considered these same I.C.C. regulations and had held that, under Missouri law, the carrier was liable only if there was an evidentiary showing that the driver was acting within the scope and course of the carrier's business. The Court of Appeals, however, adopted the interpretation of the federal regulations suggested by plaintiff and held that, under the regulations, plaintiff could make a submissible case without a showing of "scope and course of employment," as that phrase is used at common law. After its Motion for Rehearing was denied by the Court of Appeals, P.I.E. sought transfer to the Supreme Court of Missouri.

Under Missouri practice, the state supreme court considered the case as if on original appeal. P.I.E. again argued that *Brannaker* required the submission of the

"scope and course of employment" issue and also added the claim that the language of the Motor Carrier Act required that it be treated "like an owner" of the leased truck. Respondents, on the other hand, again suggested that the regulations specifically required the removal of the identifying placard before the lease would be considered terminated, and therefore, P.I.E. was still in "exclusive possession, control and use of the equipment" within the meaning of the regulation.

The Missouri Supreme Court did not decide the issue of whether the lease was still in effect at the time of this collision. Instead, the court analyzed P.I.E.'s responsibility by studying the purposes and policies underlying the federal regulations and held that, regardless of the technical effect of the regulations and the continuing force of the lease, P.I.E. would be liable under an "apparent authority" theory if they provided this sign to the drivers and failed to remove it before the time of the collision.

Presentation of the Federal Question

Petitioner's asserted right to be treated "like an owner" of a leased truck and petitioner's claim that the regulation somehow contradicts the provisions of the Motor Carrier Act (and therefore violates Article I, Section 1 of the United States Constitution) came late in the proceedings. Throughout the course of the trial and in the argument and submission of post-trial motions to the trial court, P.I.E. argued only state law issues, including respondents' failure to submit "scope and course of employment" as required by traditional Missouri respondeat superior cases. Similarly, in the Missouri Court of Appeals, Southern District, P.I.E. argued the scope and course of employment issue and emphasized the fact that it did not participate in or even have knowledge of the trip in ques-

tion. It was in P.I.E.'s reply brief in the Missouri Court of Appeals that petitioner first cited the Motor Carrier Act language (49 U.S.C. § 11107(a)) and argued that it should be treated "like an owner" of the truck. This argument, coming for the first time in the reply brief, was ignored by the Court of Appeals.

After transfer to the Missouri Supreme Court, P.I.E. did raise and argue its interpretation of the Motor Carrier Act and contended that it should be entitled to be treated "like an owner" (which, according to P.I.E., meant there should be a showing of scope and course of employment before liability was established). Still, petitioner did not suggest that the purported contradiction between the language of the Motor Carrier Act and the language of the I.C.C. regulation created any constitutional question. After the Supreme Court of Missouri rendered its opinion, P.I.E. filed its Motion for Rehearing. There, P.I.E. argued for the *first* time that the alleged contradiction between the federal regulation and the enabling statute raised a constitutional question about the validity of the regulation. That constitutional question was neither addressed nor decided by the Missouri Supreme Court.

SUMMARY OF ARGUMENT

The Missouri Supreme Court's decision in this case was based on an expanded application of the common-law rule of "apparent authority." The court expressly declined to decide whether there was an I.C.C. lease in effect at the time of this accident. Though the court did fully discuss the policy reasons underlying the federal regulatory scheme, and though the court applied those same policy reasons to reach its decision here, no interpretation or application of the I.C.C. regulations was attempted.

Moreover, the court did not consider or decide the constitutional question raised by P.I.E. late in the state appellate process. For these reasons, it is clear that no federal question has been decided so as to provide a jurisdictional base for review by the United States Supreme Court.

Assuming, for sake of argument, that the Missouri Supreme Court opinion does constitute the interpretation and application of federal regulations, this Court should exercise its discretionary power to decline review of this case. The jury in this case determined that P.I.E. had leased this truck and had failed to remove its identifying placard. It was concluded that this truck was being used in Interstate Commerce at the time of the accident. Under these factual circumstances, a conclusion that the lessee-carrier is liable is in the mainstream of those cases interpreting and applying the I.C.C. regulations. While there is some conflict in the decisions applying I.C.C. regulations where the accident occurs during a movement *not* related to interstate commerce, that factual issue is not present here. There is no reason to require the United States Supreme Court to review this particular application of the I.C.C. regulations.

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ARGUMENT: REASONS FOR DENYING THE WRIT

I.

There Has Been No Federal Question Presented and Decided so as to Provide a Jurisdictional Basis for Review by This Court; This Is True Because:

A. The constitutional question asserted here by petitioner was first raised in petitioner's motion for rehearing in the Supreme Court of Missouri; it was never presented to the lower state courts and was not considered or decided by the Missouri Supreme Court.

It is clear that the United States Supreme Court is without jurisdiction to issue a writ of certiorari to a state

court unless a federal question has been timely raised and properly presented in the state court proceeding. *See, e.g., Ellis v. Dixon,* 349 U.S. 458 (1955); *Congress of Industrial Organizations v. McAdory,* 325 U.S. 472 (1945). If the higher state courts fail or refuse to hear the federal question because it was not timely raised in the courts below, then the United States Supreme Court will not review the question and will not issue certiorari. *Williams v. Georgia,* 349 U.S. 375 (1955); *Hartford Life Insurance Co. v. Johnson,* 249 U.S. 490 (1919); *Erie Railroad Co. v. Purdy,* 185 U.S. 148 (1902).

P.I.E. contends that the I.C.C. regulations as interpreted by the Missouri courts are somehow in conflict with the provisions of the Motor Carrier Act, and, therefore, that the regulations violate Article I, Section 1 of the United States Constitution. That claim was not timely raised in the Missouri state courts. It was never mentioned, and the United States Constitution was never cited, in either the trial court or the Missouri Court of Appeals. Moreover, that claim was not raised in P.I.E.'s appellant's brief, reply brief, or oral argument before the Missouri Supreme Court. At page 17 of its Petition for Writ of Certiorari, P.I.E. admits that the first time the constitutional claim was made was in its motion fo rehearing in the Supreme Court of Missouri. At that late stage, of course, the argument was nothing more than an afterthought. The Missouri Supreme Court did not even take note of it, much less decide the question one way or the other.

Since the claim of constitutional invalidity was not presented in the lower state courts and was not considered or determined by the Missouri Supreme Court, it should not now be the basis for review by this Court.

B. Petitioner's claimed right "to be treated like an owner" under the provisions of the Motor Carrier Act was never mentioned in the trial court, was asserted in the Missouri Court of Appeals only in petitioner's reply brief, and was not considered as a determinative factor by the Missouri Court of Appeals or the Missouri Supreme Court.

The second federal question asserted by P.I.E. as a basis for review in this Court suffers from the same infirmity. P.I.E. claims a right guaranteed by 49 U.S.C. Section 11107(a) to be treated "as if it were the owner" of the leased truck. Even if one were to assume that the phrase in the statute was sufficient to rise to the level of a federally protected "right," P.I.E. failed to make a timely assertion of that right.

P.I.E.'s trial theory was that it had never had any contact with the drivers of this truck and, therefore, could not be held vicariously liable. P.I.E. never argued to the jury that the Motor Carrier Act required that it be treated "like an owner." P.I.E. never suggested an instruction be given to the jury based on that federal statute. P.I.E. never argued to the trial court in post-trial proceedings that its obligation under the Motor Carrier Act was like that or limited to that of an owner. In fact, after the trial court ruled the post-trial motions, P.I.E. filed its appeal in the Missouri Court of Appeals and thoroughly briefed the issues without ever citing the Motor Carrier Act or asserting any right or privilege under it. The contention now made was first raised by P.I.E. in its reply brief in the Missouri Court of Appeals. Though the Court of Appeals' opinion extensively discussed P.I.E.'s liability, it did not consider the belated assertion that a federally protected right existed because of the language of the Motor Carrier Act. The same was true after the case was transferred to

the Missouri Supreme Court. The Supreme Court decided the case as it would any question of common-law agency. The policies and purposes underlying the federal regulatory scheme were given due consideration, but the asserted right of a carrier under the Motor Carrier Act was never even mentioned by the Court.

Since petitioner's claimed right under the Motor Carrier Act to be treated "like an owner" was not timely asserted in the lower state courts, and since it was not considered and ruled by any of the state courts, it should not be the basis for review by the United States Supreme Court.

C. The decision of the Missouri Supreme Court, though influenced by the policy reasons underlying the federal regulatory scheme, was clearly based on the common-law rule of "apparent authority"; the Missouri Supreme Court expressly refused to interpret the federal regulation and decide whether a lease still existed at the time of the accident; therefore, there was no "federal question" decided here.

The only federal question that was timely raised and presented throughout the course of the proceedings in the Missouri state courts was the interpretation of federal regulations. As framed by plaintiffs-respondents to the trial court, that question was whether the I.C.C. regulations require that the lessee-carrier be responsible for leased equipment until it removes its sign, even though that equipment is not being used to directly serve the carrier's interest at the time of the accident. Plaintiffs argued from the beginning that the regulations had that force and effect. Defendant-petitioner, of course, argued otherwise. This issue, however, cannot be the jurisdictional basis for review here because the Missouri Supreme Court did not decide this question. Instead, the Missouri

Supreme Court expressly avoided any interpretation of the I.C.C. regulations and found P.I.E. responsible on an expanded common-law "apparent agency" theory based upon the same public policy that led to the adoption of the federal regulation.

The fact that the Missouri Supreme Court did not interpret the federal regulation and determine whether a lease was still in effect is abundently clear from the language of the opinion itself. Judge Blackmar, writing for the majority of the court, first recognized that federal regulations do impact tort liability theories, but it was clear to Judge Blackmar that the federal regulations did not mandate a particular holding:

> The federal statute and regulations have been held, in numerous cases from different jurisdictions, to have a definite and substantial impact on tort liability. These holdings are not mandated by any controlling authority from the Supreme Court of the United States, but rather represent *the consensus of judicial authority based on analysis of statutory policy* and implementing regulations. (662 S.W.2d at 243; P.I.E.'s Appendix A at A-10) (Emphasis Supplied)

The court expressly stated that its decision was based upon a theory of apparent authority, without regard to the continuing force and effect of the lease under the I.C.C. regulations:

> By allowing the trucker to retain the signs, [*P.I.E.*] *contributed to the appearance that the unit was operating under P.I.E.'s authority.* . . . [I]t is quite possible that a truck with unauthorized signs might be able to attract freight business which would not otherwise fall to it.
>
> We conclude that P.I.E. may be held liable for the truck driver's negligence, *without regard to the continuing force of the lease,* if the jury finds: (1) that a sign or identifying legend was furnished by the car-

> rier in connection with a lease; (2) that the sign was on the truck at the time of the accident; and (3) that the truck was hauling regulated freight at the time of the accident.[19]
>
> The conclusion we reach is based on statutory *policy* rather than a conventional respondent superior theory. . . . *Our holding centers on the appearance of authority created and maintained when a sign is issued and not retrieved.* (662 S.W.2d at 245-246; P.I.E.'s Appendix A-14 through A-16) (Emphasis Supplied)

The court's footnote 19, which is referenced in the above quoted segment of the opinion, is also illustrative of the fact that the Court was not interpreting or applying the federal regulations so as as to decide whether there was a lease still in effect:

> [W]e [do not] have to deal with a situation such as was present in *Brannaker* or in *Rodriguez v. Ager, supra,* in which there was evidence of a lease still in effect. (662 S.W. 2d at 245, n. 19; P.I.E.'s Appendix A at A-15)

Undoubtedly, the federal regulatory scheme was important to the reasoning of the Missouri Supreme Court. The policies which justify the enactment of a regulation requiring the removal of a sign, are the same policies which justify the adoption of the "apparent authority" rule of law exhibited here. Nevertheless, the court's opinion is without question based upon an expanded version of the common law of agency. The court expressly declined to decide whether or not there was or was not a lease in effect within the meaning of the federal regulations. Accordingly, there was no federal question decided by the Supreme Court of Missouri, and there can be no basis for review in the United States Supreme Court.

II.

Even if the Decision of the Missouri Supreme Court Is Considered an "Interpretation" of the Federal Regulation (and, Therefore, the Determination of a Federal Question), Review by This Court Should Be Denied Because:

A. The Court's interpretation of the federal regulations was clearly correct and is in accord with the leading authorities.

Every indication in the opinion of the Missouri Supreme Court is that its decision was made as a matter of common-law agency based on sound public policy. If that is true, then no jurisdiction exists to issue a writ of certiorari. However, if one *assumes* that the Missouri Supreme Court has interpreted the federal regulations and decided a federal question, this Court should still exercise its discretion to deny the writ of certiorari; the Missouri court's interpretation of the regulations was clearly correct and in accord with the leading authorities.

These regulatic , codified at 49 C.F.R. section 1057.4, provide that an authorized carrier may lease non-owned equipment so long as the lease provide for "exclusive possession, control, and use of the equipment" for the duration of the lease. Such leases must specify their duration, which in most circumstances may not be less than 30 days. Regardless of the minimum duration stated in the lease, the carrier's obligation under the lease will exist until the carrier (1) obtains a signed receipt from the lessor for return of the equipment, and (2) removes its identifying signs and placards. The pertinent portions of the regulations follow:

> **(a) Contract requirements.** The contract, lease, or other arrangement for the use of such equipment:
>
> . . . .

(4) Exclusive possession and responsibilities. Shall provide for *the exclusive possession, control, and use of the equipment*, and for *the complete assumption of responsibility in respect thereto*, by the lessee *for the duration of said contract*, lease or other arrangement, ...

. . . .

(6) Duration to be specific. . . . *The duration of the contract, lease or other arrangement shall coincide with the time for the giving of receipts for the equipment as required by paragraph (b) of this section*, ...

. . . .

(b) Receipts for equipment to be specific. . . . *when the possession by the authorized carrier ends; it or its employee or agent shall obtain from the owner of the equipment, or its regular employee or agent duly authorized to act for it, a receipt specifically identifing the equipment and stating therein the date and the time of day possession thereof it taken.*

. . . .

(d) Identification of equipment as that of the authorized carrier. *The authorized carrier* acquiring the use of equipment under this rule *shall properly and correctly identify such equipment during the period of the lease*, ...

(1) Identification to be removed when lease terminated. *The authorized carrier* operating equipment under this part *shall remove any legend, showing it as the operating carrier*, displayed on such equipment, and shall remove any removable device showing it as the operating carrier, *before relinquishing possession of the equipment.* (49 C.F.R. § 1057.4; P.I.E.'s Appendix I) (Emphasis Supplied)

The burden of obtaining these lease agreements and properly terminating the agreements is placed squarely on *the authorized carrier*. It is *the carrier*, rather than the lessor-driver, who is required to comply with the regula-

tions — including (1) obtaining receipts for the equipment and (2) removal of its identifying legends before relinquishing possession of the equipment. This burden is certainly justified when the policies underlying the enactment of these I.C.C. regulations are considered.

The Policy Underlying the Regulatory Scheme

These regulations were first upheld against constitutional challenges in *American Trucking Ass'ns. v. United States*, 345 U.S. 913 (1953). This Court thoroughly discussed the conditions of the trucking industry and the abuses which it saw there. It concluded that the imposition of a strict regulatory scheme on the authorized carriers was justified in order to avoid those abuses and achieve the needed goals.

One of the problems which the Supreme Court recognized in *American Trucking Ass'ns.*, and which the regulations were designed to remedy, was the provision of a financially responsible party to stand behind any interstate trucking operation which negligently injures members of the traveling public. *See also, Transamerican Freight Lines, Inc. v. Brada Miller Freight Systems, Inc.*, 423 U.S. 28 (1975); *Rodriguez v. Ager*, 705 F.2d 1229 (10th Cir. 1983); *Alford v. Major*, 470 F.2d 132 (7th Cir. 1972). These cases suggest that, in every case where a truck driver negligently injures a member of the public, *there should be a remedy!*[2] If the truck is being operated in interstate

[2] P.I.E. has criticized plaintiffs throughout this appeal for making this statement, and suggests plaintiffs are merely looking for a "deep pocket." Plaintiffs stand by this statement! The public policy discussed in these cases is *fair compensation to innocent victims* of the abuses in the trucking industry. The concept of fair compensation includes not only a legal remedy, but also the financial ability to make payment pursuant to that legal remedy.

commerce, subject to the control of the I.C.C., the authorized carrier must bear the burden of providing that remedy, thus allocating the risk throughout the industry.

The courts also recognize that the use of a sign identifying a responsible, certified carrier often permits an irresponsible, independent operator to travel in interstate commerce without being detected by the authorities. As stated in *Leotta v. Plessinger*, 8 N.Y. 2d 449, 209 N.Y.S. 2d 304, 171 N.E.2d 454 (1960):

> [P]rospective shippers were more likely to give business to one who operated under an established common carrier name and certificate than to an individual trucker operating under his own name without I.C.C. certification and without any evidence of financial responsibility. Furthermore, public officials checking the vehicle en route would be influenced by the presence of the I.C.C. placard as indicating that proper inspections of the vehicle had been made and that the operation was being conducted by a responsible certified carrier. 171 N.E.2d at 458

Accordingly, the regulations make the carrier's responsibility correspond to the appearance of its placard on the leased equipment. The removal of the carrier's signs is a prerequisite to "relinquishing possession" (§ 1057.4(d)(1)) and, therefore, must be accomplished before the lease is terminated (§ 1057.4(a)(6) and § 1057.4(b). The I.C.C. carrier is held to have "exclusive possession and control" of any truck which it has leased until such time as the lease is properly terminated by removing the identifying signs.

Similarly, the courts recognize that there are literally thousands of independent owner-operators, and relatively few authorized carriers. Proper control of the industry can be effected *only* if the obligation to comply with the

regulations is cast upon the authorized carriers. This principle has been stated by one court as follows:

> [T]he ICC carriers are the only effective institutions capable of insuring that non leased equipment is kept off the highways, and as possessors of a profitable public franchise, these carriers must assume the responsibility for policing this area. *Cosmopolitan Mutual Insurance Company v. White*, 336 F.Supp. 92, 97 (D.Del. 1972)

It is for these reasons that the regulations impose on *the carrier*, rather than the driver, the obligation to accomplish each of the steps necessary to termination of the lease:

> *The authorized carrier* . . . shall remove any legend . . . before relinquishing possession of the equipment. § 1057.4(d)(1)
>
> [W]hen the possession by the authorized carrier ends; *it or its employee or agent* shall obtain . . . a receipt specifically identifying the equipment. . . . § 1057.4(b)

The regulatory scheme certainly does not amount to an unfair burden on the I.C.C. carriers. In fact, it is an economic advantage for them. They are permitted to lease trucks to carry their goods but are not required to *purchase* all the expensive equipment they use. In exchange for this economic benefit, the carrier must keep up with its leases and accept the financial responsibility for the trucks which they have authorized to be on the road. It is the carrier who must police it's own industry!

Further, the burden of policing this industry is certainly *not* an impossible one. The carrier has the power of the purse! P.I.E. could have refused to pay Brown and Singleton for their services until the receipts were signed and the placards were returned. In fact, Singleton testified that they continued to do business with P.I.E., without criticism, after they had completed the trip for which the

lease was entered and had failed to return the placards. The burden imposed on the carrier is not an impossible one if the carrier is interested in complying with the regulations, but the evidence here shows that P.I.E., or at least some of its agents, were just not interested.

Moreover, it was P.I.E.'s leasing of this particular truck that permitted Brown and Singleton to operate in interstate commerce. The P.I.E. placard was attached to the truck and visible when Brown and Singleton pulled in to Marlo's office to do the paperwork on this load. Marlo's president testified that, though he had no specific memory of this inspection, the policy of his firm would be to inspect the equipment being used on this kind of trip, and such an inspection might well include a check of the driver's I.C.C. authority and placards. Singleton was not concerned about being stopped by the authorities because they had a P.I.E. sign on the truck, and that would permit them to travel without incident so long as they could avoid highway weigh stations. It was obvious from Plaintiffs' Exhibit No. 8, a photograph of the P.I.E. sign on the side of the truck, that the placard was not a handwritten sign but was a standardized, mass-produced form that would be used on all of P.I.E.'s hundreds and hundreds of trucks. Any law enforcement officer knowledgeable about the trucking industry would recognize it as the standard sign of a major, legitimate interstate carrier.

Finally, it should be remembered that the very nature of this activity justifies the imposition of a tough legal responsibility. The vehicles involved here are not 2500 pound automobiles, but tractor trailer trucks which weigh up to 80,000 pounds. Unlike privately owned automobiles, these trucks average over a hundred thousand miles a year on major highways. The potential for death and destruc-

tion from such an operation is great! The need for controlling such an operation is also great.

Cases Applying the I.C.C. Regulations: Termination of the Carrier's Responsibility

The cases which have interpreted and applied these I.C.C. regulations have consistently held that the carrier's obligations to obtain a signed receipt and remove its identification are *prerequisites* to the termination of its responsibility under an I.C.C. lease. *Mellon National Bank & Trust Co. v. Sophie Lines, Inc.*, 289 F.2d 473 (3d Cir. 1961) is a leading case. It held that Turner Transfer, Inc., an I.C.C. carrier, was liable as a matter of law for any negligence the jury might attribute to the lessor driver. The first step in the court's rationale was to determine whether the lease had been terminated at the time of the accident:

> Turner could have effectually eliminated its responsibility for the truck's use in only one way i.e. (1) removing " • • • any legend showing it as the operating carrier, displayed on such equipment • • • and (2) obtaining the receipt called for by [the regulations]. . . ." It failed to do this. 289 F.2d at 476-477

Also in point are *Kreider Truck Service, Inc. v. Augustine*, 76 Ill.2d 535, 394 N.E.2d 1179, 1182 (1979) ("[T]he provisions of the ICC regulations place upon the lessee exclusive possession and complete responsibility, which remain until possession is surrendered and the identification legend of the lessee-carrier is removed."); *Cosmopolitan Mutual Insurance Company v. White*, 336 F. Supp. 92, 96 (D. Del. 1972) ("Obtaining a receipt for the return of the vehicle and removing the ICC placards are prerequisites to termination of an ICC lease."); *Cox v. Bond Transportation, Inc.*, 53 N.J. 186, 249 A.2d 579, 588-589 (1969) ("Bond could eliminate this presumption [of

liability] only by conforming with the regulations, i.e., (1) removing '• • • any legend, showing it as the operating carrier, . . .' and (2) obtaining the receipt called for by Section 1057.4. . . ."); and *Bankers & Shippers Insurance Co. of New York v. Watson*, 216 Va. 807, 224 S.E.2d 312, 314-15 (1976) ("[T]he lease agreement . . . required for its termination the removal of interstate permit numbers and the giving of a receipt. . . . The failure to comply with these regulations, as a matter of law, prevents cancellation of the lease and an avoidance of liability on the part of the lessee. . . ."). *See also, Rodriguez v. Ager*, 705 F.2d 1229 (10th Cir. 1983); *Wellman v. Liberty Mutual Insurance Company*, 496 F.2d 131 (8th Cir. 1974); *Schedler v. Rowley Interstate Transportation Co., Inc.*, 68 Ill.2d 7, 368 N.E.2d 1287 (1977); *Brannaker v. Transamerican Freight Lines, Inc.*, 428 S.W.2d 524 (Mo. 1968).

The regulations clearly set out the requirements for the termination of an I.C.C. lease. All of the cases cited above recognize those requirements and agree that a lease is not terminated and the carrier's liability under it is not discharged until the identifying placard is removed from the leased vehicle. Accordingly, the Missouri Supreme Court's decision, if it involves a federal question at all, falls within the mainstream of a well-established line of judicial thought applying these regulations to establish civil tort liability.

B. The interpretation of the regulations urged by petitioner would undermine the entire purpose and effect of the regulatory scheme.

The Motor Carrier Act and the regulations promulgated pursuant to it were designed to remedy the abuses which were evident in the trucking industry. The "independent contractor" defenses were eliminated, and the

scope of the carrier's responsibility for leased trucks was expanded. Additionally, the burden was placed squarely upon the carrier to police its own industry.

P.I.E. urged the courts below, and now asks this Court, to adopt an interpretation of these regulations which holds the carrier liable *only* if these is a factual determination that the driver was serving the carrier's business interests at the time of the accident. Such an interpretation would return the state of the law to traditional respondent superior principles. The regulations of the Interstate Commerce Commission would have *no effect at all* in determining the scope of the liability of an authorized lessee-carrier.

Principles of statutory construction and simple logic dictate that the regulations of a federal commission should not be interpreted so as to make them totally ineffective. The interpretation urged by P.I.E. would have precisely that effect. It was not adopted by the lower courts, and it should not now be considered by this Court.

C. Contrary to petitioner's suggestion, there is no conflict between the decisions of other jurisdictions interpreting these regulations so as to require review and clarification by the United States Supreme Court

P.I.E. claims that there is a conflict in the decisions of the courts of various jurisdictions that requires Supreme Court reconciliation. Respondents concede that there is a split in the decisions on one issue involved in interpreting these regulations, but that issue is not raised by the facts of this case. P.I.E. would have this Court review the case for purposes of deciding an issue not required for final determination of this cause.

P.I.E. asserts that "one distinct line" of cases interpreting the regulations holds that the lessee-carrier is not liable where the driver has completed his work for the

carrier and the driver is on a mission of his own. P.I.E. cites five cases which, it says, stand for that proposition. A review of each of those cases, however, shows that they provide no support to P.I.E. here. Each of those cases involved a situation where the driver was using the subject truck for personal transportation, unrelated to interstate commerce and unrelated to any activity which the Interstate Commerce Commission has authority to regulate.[3]

Quotations from two of the cases cited by P.I.E. clearly illustrate that the conclusion of those courts would have been different had the truck driver been involved in an interstate movement at the time of the accident. *Schmidbauer v. Baltimore & Pittsburgh Motor Express Company*, 228 Md. 637, 181 A.2d 325 (1962) held that a carrier was not liable for a driver's use of a tractor-trailer truck while the driver was on his way to a movie theater for personal entertainment. The Court specifically pointed out that this particular transportation was entirely disassociated with interstate commerce:

> [W]e, therefore, hold that [the federal regulation] does not impose liability on the franchised carrier between interstate movements, *when the nonowned equipment is being utilized in an activity that is entirely disassociated with interstate or foreign commerce*, such as the activity of the tractor involved in the present case, as shown by the undisputed facts. 181 A.2d at 330 (Emphasis Supplied)

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[3] The five cases cited by P.I.E. are: *Wilcox v. Transamerican Freight Lines, Inc.*, 371 F.2d 403 (6th Cir. 1967) (driver using truck for personal transportation to and from his home after work hours); *Cox v. Bond Transportation, Inc.*, 53 N.J. 186, 249 A.2d 579 (1969) (driver using truck for personal transportation on errands near his home); *Gackstetter v. Dart Transit Company*, 269 Minn. 146, 130 N.W.2d 326 (1964) (driver using truck for a personal errand while on his way home); *Kaplan Trucking Company v. Lavine*, 253 F.2d 254 (6th Cir. 1958) (driver using truck for personal transportation to and from home); *Schmidbauer v. Baltimore & Pittsburgh Motor Express Company*, 228 Md. 637, 181 A.2d 325 (1962) (driver using truck for transportation to a movie theater for personal entertainment).

Similarly, in *Cox v. Bond Transportation, Inc.*, 53 N.J. 186, 249 A.2d 579 (1969), the court recognized the importance of this factor. There, the jury found that the driver was, under the common law, serving the carrier's business interests at the time of the collision. The court affirmed the judgment against the carrier and clearly indicated that had the truck been involved in interstate commerce at the time of the collision, the carrier's responsibility would have been established as a matter of law and without resort to jury determination:

> Bond [the carrier] attempts to distinguish [*Mellon National Bank and Trust Company v. Sophie Lines*, 289 F.2d 473 (3d Cir. 1961)] because the Turner tractor was in the course of an interstate trip when the accident happened. The interstate aspect may appear to make the case a stronger one than ours for the imposition of liability on the carrier. . . . At most, *the different circumstance* [*in this case*] *would have resulted in a jury question as to whether under the course of conduct shown, Turner was receiving an incidental benefit from the intrastate journey* within the scope of the regulations. 249 A.2d at 591, 592 (Emphasis Supplied)

A "conflict" among the decisions *does* exist because many cases have gone much farther than those five cases cited by P.I.E. and have held that the carrier who leases the truck and fails to remove its identifying placard is liable regardless of the activity in which the truck was involved at the time of the accident. These cases emphasize the language of the regulations which places "*exclusive* possession and control" of the truck in the lessee-carrier. *Kreider Truck Service, Inc. v. Augustine*, 76 Ill.2d 535, 394 N.E.2d 1179 (1979) is an excellent example of cases which have adopted this position. In the *Kreider* case, the intermediate appellate court had ruled in favor of the lessee-carrier because the truck was being used purely intrastate at the time of the accident. However, the Illinois

Supreme Court reversed the lower court and held the lessee-carrier responsible even though the truck was not being used in interstate commerce. The Court emphasized the policies underlying the enactment of the federal regulations:

> [T]he responsibility of the lessee who vested the owner-lessor with this authority must remain until possession is surrendered in the manner provided in the regulations. . . . To permit a shifting of responsibility from lessee to owner and back to lessee, depending upon in whose business the vehicle is being used, without the execution of the required receipts when possession changes and without removing the carrier's identification number could lead to an abuse of the privilege granted by the permit and undermine the effectiveness of the regulation in accomplishing the purpose for which they were adopted. 394 N.E.2d at 1182

Other cases which strictly apply the exclusive possession and control language and follow the reasoning of the *Kreider* court include the leading federal cases: *Rodriguez v. Ager*, 705 F.2d 1229 (10th Cir. 1983); *Wellman v. Liberty Mutual Insurance Company*, 496 F.2d 131 (8th Cir. 1974); *Mellon National Bank and Trust Company v. Sophie Lines, Inc.*, 289 F.2d 473 (3d Cir. 1961).

Careful consideration of all of the lessee-carrier cases shows that the only "conflict" in the decisions is between (1) those courts which hold the lessee-carrier liable regardless of the use to which the truck is put and (2) those courts which hold the carrier liable only if the truck is being used in interstate commerce. ***No cases have been cited by P.I.E. and no cases have been located by respondents which hold the carrier liable only when the truck is being used to haul goods with the express knowledge and consent of the lessee-carrier!*** The "lines of authority" are illustrated by the following chart:

All Cases Where Carrier Leased Truck but Failed to Remove Its Sign

1. Cases holding carrier liable only on a showing that driver was hauling a load with the knowledge and consent of carrier at time of accident:

   None

2. Cases holding carrier liable only on a showing that driver was hauling in interstate commerce at time of accident:

   Wilcox v. Transamerican Freight Lines, Inc., 371 F.2d 403 (6th Cir. 1967);

   Kaplan Trucking Company v. Lavine, 253 F.2d 254 (6th Cir. 1958);

   Kreider Truck Service, Inc. v. Augustine, 64 Ill. App.3d 576, 381 N.E.2d 791, 1182 (1978); rev'd 76 Ill.2d 535, 394 N.E.2d 1179 (1979);

   Schmidbauer v. Baltimore & Pittsburgh Motor Express Company, 228 Md. 637, 181 A.2d 325 (1962);

   Gackstetter v. Dart Transit Company, 269 Minn. 146, 130 N.W.2d 326 (1964);

   Cox v. Bond Transportation, Inc., 53 N.J. 186, 249 A.2d 579 (1969).

3. Cases holding carrier liable regardless of what driver was doing at time of accident:

   Rodriguez v. Ager, 105 F.2d 1229 (10th Cir. 1983);

   Wellman v. Liberty Mutual Insurance Company, 496 F.2d 131 (8th Cir. 1974);

   Mellon National Bank and Trust Company v. Sophie Lines, 289 F.2d 473 (3d Cir. 1961);

   Simmons v. King, 478 F.2d 857 (5th Cir. 1973);

   Cosmopolitan Mutual Insurance Company v. White, 336 F. Supp. 92 (D. Del. 1972);

   Hodges v. Johnson, 52 F.Supp. 488 (W.D. Va. 1943);

   Home Indemnity Company v. St. Paul Fire & Marine Insurance Company, 585 S.W.2d 419 (Ky. App. 1979);

   ***Kreider Truck Service, Inc. v. Augustine*, 76 Ill.2d 535, 394 N.E.2d 1179 (1979);**

Schedler v. Rowley Interstate Transportation Company, 68 Ill.2d 7, 368 N.E.2d 1287 (1977);
Weeks v. Kelley, 377 A.2d 444 (Me. 1977);
Felbrant v. Able, 194 A.2d 491 (N.J. 1963);
Leotta v. Plessinger, 8 N.Y.2d 449, 209 N.Y.S.2d 304, 171 N.E.2d 454 (1960).

In deciding the instant case, the Missouri Supreme Court clearly recognized the import of those cases in category no. 2. Those cases have logical support — when the truck is being used for an activity not related to interstate commerce, there is no basis for imposing strict regulation of the activity. Accordingly, the Missouri court held that P.I.E.'s liability could be established if the jury found (1) the carrier leased the truck and provided a sign to be displayed on it, (2) the carrier failed to remove that sign before the accident, and *(3) the truck was being used in interstate commerce at the time of the accident.* (662 S.W.2d at 245; P.I.E.'s Appendix A at A-15.)

Actually, the Missouri Supreme Court did not have to decide between the positions represented by categories no. 2 and 3 above. The evidence was uncontradicted in this case that Brown and Singleton *were* hauling regulated freight in interstate commerce at the time of the accident, so P.I.E. would be liable in any event. The court's statement of the rule is most consistent with the language of the cases discussed in category no. 2, but there is no way to know what ruling would have been made had this accident occurred while the truck was not on an interstate movement.

Since the only "conflict in the decision" is between category nos. 2 and 3 above, and since P.I.E. is liable under *either* of those two rules, then there is certainly no basis for review by this Court on the theory that the conflicting decisions need to be reconciled.

D. The rules governing the motor carrier industry and providing protection to the traveling public have been amply served by the promulgation of comprehensive regulations by the Interstate Commerce Commission and by the consistent application of those regulations by various state and federal courts; no further purpose would be served by requiring the Court to apply those regulations in the particular factual circumstances presented here.

P.I.E. suggests that this Court review the case so as to establish an appropriate rule of liability, thereby providing guidance to the trucking industry and protection to the traveling public. Respondents respectfully submit that such a rule of liability has already been defined by the careful and detailed work of the Interstate Commerce Commission in promulgating these regulations. Moreover, as has been herein shown, the courts interpreting these regulations have applied them consistently and uniformly with respect to any facts which are at issue here. Accordingly, there would be no useful purpose served by requiring this Court to review those regulations and apply them to any particular factual situation that might be framed in this particular case. Such a review would be an unnecessary imposition upon the valuable time of the nation's highest court.

CONCLUSION

For all the reasons heretofore stated, respondents respectfully submit that the Petition for Writ of Certiorari to the Supreme Court of Missouri should be denied.

Respectfully submitted,

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